

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
June 24, 2008 Session

STATE OF TENNESSEE v. TEDDY RAY MITCHELL

**Direct Appeal from the Circuit Court for Hamblen County
No. 06CR464 John Dugger, Jr., Judge**

No. E2007-02807-CCA-R3-CD - Filed August 14, 2008

A Hamblen County jury convicted the Defendant, Teddy Ray Mitchell, of one count of disorderly conduct, a class C misdemeanor. At the sentencing hearing, the trial court granted the Defendant's request for judicial diversion. The Defendant appeals, contending that: (1) the evidence is insufficient to sustain his conviction; (2) his conviction violates constitutional provisions protecting free speech; and (3) the trial court erred when it allowed testimony about the Defendant's conduct when parking his car, which was not the basis for his arrest. We conclude that no appeal as of right exists because the Defendant was granted judicial diversion and no judgment of conviction has been entered. Accordingly, we dismiss his appeal.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and JAMES CURWOOD WITT, JR., JJ., joined.

Darren V. Berg, James C. Wright, and R. Deno Cole, Knoxville, Tennessee, for the Appellant, Teddy Ray Mitchell.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Rachel West Harmon, Assistant Attorney General; C. Berkeley Bell, District Attorney General; Victor Vaughn, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

In this case, the Defendant was indicted on charges of disorderly conduct and resisting arrest for his actions during an anti-illegal immigration rally held on the grounds of the Hamblen County Courthouse in Morristown, Tennessee. At the Defendant's jury trial, officers present at the rally testified that they first encountered the Defendant when he attempted to park on the

sidewalk in a prohibited area. When officers brought this to the Defendant's attention, the Defendant made a derogatory racial remark to the officer and then sped away. At the entrance gate, officers again encountered the Defendant and told him that he could not bring a flag on a stick to the rally. The Defendant started "yelling and screaming" that he was an American and, therefore, officers could not tell him that he could not bring in the flag. Officers told him the flag was allowed, but the stick was prohibited. The officers attempted to arrest the Defendant, who, according to officers, used the flag pole to attempt to evade the officers. Other witnesses testified that the Defendant was only attempting to ensure that the flag did not touch the ground. The officers eventually handcuffed the Defendant. A videotape of the incident was played for the jury. The jury convicted the Defendant of disorderly conduct and acquitted him of resisting arrest.

At sentencing, the Defendant requested and was granted judicial diversion. A judgment form entered by the trial court reflects that the Defendant was granted judicial diversion after 30 days of probation. Notably, the trial court used a standard form for a judgment of conviction, but, because the Defendant was granted judicial diversion, no judgment of conviction against the Defendant exists.

II. Analysis

The Tennessee Rules of Appellate Procedure require us to determine whether we have jurisdiction in every case on appeal. *See* Tenn. R. App. P. 13(b). In criminal cases, an appeal as of right lies from a final judgment of conviction. Tenn. R. App. P. 3(b). In this case, the trial court granted the Defendant judicial diversion. Under the provisions of the judicial diversion statute, if the defendant does not violate any of the conditions of probation, the court shall dismiss the proceedings without an adjudication of guilt. T.C.A. § 40-35-313(a)(2) (2007).

In *State v. Norris*, 47 S.W.3d 457, 461-63 (Tenn. Crim. App. 2000), this Court concluded that an Appellant has no appeal as of right pursuant to Rule 3(c) of the Tennessee Rules of Appellate Procedure when the Appellant had been granted judicial diversion. *Id.* at 462. As observed in *Norris*, no disharmony or unfairness results from this rule because "a trial court may not impose judicial diversion except with the defendant's consent." *Id.* (citing T.C.A. § 40-35-313(a)(1)(A) (1997)). "As a practical matter, a trial court rarely if ever grants judicial diversion until a defendant has literally begged for it." *Norris*, 47 S.W.3d at 462. Thus, while the choice to accept judicial diversion may jeopardize a defendant's opportunity to raise a legal issue, the *quid pro quo* is that the defendant who accepts diversion can emerge from the process without a conviction. *Id.*

In *Norris*, this Court also acknowledged that the situation may arise in which a defendant granted judicial diversion may seek an appeal pursuant to Tennessee Rule of Appellate Procedure 9, governing interlocutory appeals, or Tennessee Rule of Appellate Procedure 10, governing extraordinary appeals. Neither of those rules is applicable to the appeal in this case.

In this case, it is clear that the Defendant requested and was granted judicial diversion. His consent to diversion permitted the expungement of his adjudication of guilt, waiving all non-

jurisdictional defects. Because the appeal is not properly before this Court, we dismiss the appeal.

III. Conclusion

For the foregoing reason, the appeal is dismissed.

ROBERT W. WEDEMEYER, JUDGE